Supreme Court, U.S.
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In the Supreme Court of the United States

DOUGLAS VLADIMIR LOPEZ-DUBON,
Petitioner,

v.

ERIC H. HOLDER, JR.,
U.S. ATTORNEY GENERAL,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the federal regulations that govern the detention and release of alien juveniles (defined as aliens under 18 years of age) require that notice of the deportation proceedings be served on an adult to whom the juvenile is released?

2) Whether the regulations pertaining to service on minors, as interpreted by the Fifth and Eighth Circuits, provide an alien juvenile with legally sufficient notice of his or her deportation hearing?

3) Whether the panel's reliance on a non-precedential administrative decision was proper in view of prior decisions by this Court, the Fifth Circuit, and other circuit courts?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding before this Court are:

Petitioner: Douglas Vladimir LOPEZ-DUBON.

Respondent: Eric H. HOLDER, Jr., United States Attorney General.

Under Rule 29.6, Rules of the Supreme Court, Petitioner states that he is an individual, and that there are no corporations involved in this matter.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is reported at *Lopez-Dubon v. Holder*, 609 F.3d 642 and is reproduced in the Appendix herein at 1a-9a.

The decision of the Board of Immigration Appeals ("BIA"), entered on April 30, 2008, is not officially reported but is reproduced in the Appendix at 10a.

The order of the Fifth Circuit denying rehearing *en banc* is not officially reported but is reproduced in the Appendix at 14a.

JURISDICTION

The judgment of the court of appeals was issued on June 16, 2010. Pet. App. 1a. Petitioner's timely petition for rehearing *en banc* was denied on August 19, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

REGULATIONS AT ISSUE

8 C.F.R. § 103.5a(c)(1) and (2)(ii) provides:

> (1) Generally. In any proceeding which is initiated by the Service, with proposed adverse effect, service of the initiating notice and of notice of any decision shall be accomplished by personal service, except as provided in section 239 of the Act.
>
> (2) Persons confined, minors, and incompetents
>
> (ii) Incompetents and minors. In case of mental incompetency, whether or not

> confined in an institution, and in the case of a minor under 14 years of age, service shall be made upon the person with whom the incompetent or the minor resides; whenever possible, service shall also be made on the near relative, guardian, committee, or friend.

8 C.F.R. § 1236.3 (entitled "Detention and release of juveniles") is reproduced in the Appendix at 16a.

STATEMENT OF THE CASE

For this Court, the Petition presents an immigration case of first impression and great importance. It tests whether the government is required to serve notice of deportation proceedings, including any hearing notices, upon an adult for an alien minor under 18 years of age who is detained in, and released from, federal custody. The Immigrati n and Nationality Act ("INA") is silent with respect to service of notice upon adults on behalf of minors subject to deportation.[1] However, the Board of Immigration Appeals ("BIA"), and the Fifth and Eighth Circuits, have held that adult notification is only required for minors under 14 years of age.[2] In so doing, the courts relied on a federal regulation that requires the government to serve the initial notice of proceedings for alien minors under 14, on a

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[1] The INA requires that the charging notice "be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any)." 8 U.S.C. § 1229(a)(1).

[2] The BIA has only decided this issue through unpublished opinions.

person with whom the minor resides or a "near relative, guardian, committee, or friend." 8 C.F.R. § 103.5a(c)(2)(ii)(the "service regulations"). On the other hand, the Ninth Circuit has held that the government must be serve the notice on a responsible adult pursuant to other regulations that specifically govern the detention and release of alien juveniles—defined as aliens under 18 years of age. *See* 8 C.F.R. § 1236.3 (the "release regulations").

Both the service and release regulations are silent with respect to service of notice upon an adult for minors between 14 and 17 years of age. However, the decision below interprets the service regulations to restrict adult notification to only minors under 14 years under *all* circumstances, regardless of whether the minor is treated as an alien juvenile under the release regulations. Such interpretation has the effect of depriving alien juveniles (between 14 and 17 years of age) of receiving their notice of proceedings through an adult whom which has been designated, pursuant to the release regulations, to ensure the juvenile's appearance at all future court hearings. Thus, resolving this important question of federal law—and ending the conflict between the circuit courts—are the main reasons why this Court should grant the Petition for Writ of Certiorari.

In the present case, Petitioner seeks to rescind his *in absentia* deportation order pursuant to former 8 U.S.C. § 1252b[3] and 8 C.F.R. § 1003.26(b) because he did not receive notice of his deportation hearing as required by the statute and regulations. Specifically, he argues that because he was only 17 years old when he was placed in deportation proceedings, the initial charging notice and subsequent hearing

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[3] Section 1252b is now codified at 8 U.S.C. § 1229a.

notices should have been given to an adult.[4] Relying on 8 C.F.R. § 103.5a(c)(2)(ii), Respondent argues that the government was not required to serve the notice on an adult because Petitioner was not under 14 years of age when it initiated deportation proceedings.

1. Petitioner Douglas Lopez-Dubon is a citizen of Honduras. He was 17 years of age when the U.S. Immigration and Naturalization Service ("INS") detained him and his older brother for crossing illegally into the United States in September 1996.[5] Shortly thereafter, INS issued an Order to Show Cause ("OSC") to Petitioner, charging him of being deportable as an alien unlawfully present in the United States. The OSC informed Petitioner to expect a hearing notice in the future since the date and place of his hearing were unknown at the time. The OSC further notified Petitioner of his obligation to report any changes to his address with the immigration court in Houston, Texas. Petitioner acknowledged receipt of the OSC in writing. After Petitioner provided a Houston address where he could be reached, INS released him from custody.

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[4] There are no indications from the administrative record that the government designated an adult to whom which Petitioner would be released.

[5] The INS is the predecessor to the U.S. Immigration and Customs Enforcement ("ICE") and U.S. Citizenship and Immigration Service ("CIS"), independent agencies operating within the Department of Homeland Security. On March 1, 2003, the INS ceased to exist as an agency within the Department of Justice. Its functions were transferred to the newly formed Department of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 441, 471, 116 Stat. 2135, 2192, 2205 (codified at 6 U.S.C. § 101, *et seq.*) This Petition refers to the INS during proceedings that took place before this change occurred.

The administrative record lacks any information regarding the custodial adult to whom Petitioner was released, if any.

2. Almost seven months after INS released Petitioner, the Houston immigration court finally sent Petitioner a hearing notice to the address he provided INS when he was released. The hearing was set for May 14, 1997 in Houston. The notice, however, was returned as undeliverable and Petitioner did not appear at the hearing. The immigration court rescheduled the hearing for June 18, 1997 in Houston, but the notice was addressed to "Jose W. Vega", a person unknown to Petitioner. Petitioner did not receive the hearing notice.

In another confusing turn of events, on May 21, 1997, the immigration court in Harlingen, Texas issued a hearing notice for Petitioner. The notice was addressed again to "Jose W. Vega" on behalf of Petitioner. The court scheduled the hearing for June 19, 1997 in New Orleans, Louisiana—a day after Petitioner was required to appear in Houston for presumably the same matter. Notably, the Harlingen court issued this hearing notice immediately after it granted a change of venue to Louisiana for Petitioner's brother.

Too add to the confusion, on June 26, 1997, the immigration court in Harlingen issued yet another hearing notice for July 14, 1997 in New Orleans. The court mailed the notice to an unknown Louisiana address and a copy to Petitioner's Houston address that he initially gave upon his release.[6] The

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[6] The administrative record contains no evidence of an address change to Louisiana, let alone any evidence that Petitioner requested a change of venue to New Orleans.

notice sent to the Houston address was returned as undeliverable.

On July 14, 1997, the immigration court in New Orleans entered an *in absentia* deportation order after Petitioner did not appear at the hearing.

3. On November 17, 2006, Petitioner filed a motion to reopen his deportation proceedings with the immigration court in New Orleans, asserting, *inter alia*, that he never received his hearing notice, and that the change of venue to New Orleans was improper because he did not initiate the hearing transfer. A month later, the immigration judge denied the motion finding that Petitioner was properly served with the hearing notice because it was sent to the address he provided to INS, and there was no evidence that Petitioner notified the court of a subsequent change in his address.

4. Petitioner appealed to the BIA, which dismissed the appeal on November 20, 2007, on the ground that he was properly served with notice of proceedings pursuant to former 8 U.S.C. § 1252b. Petitioner subsequently filed a motion for reconsideration, arguing, *inter alia*, that notice of his proceedings was legally insufficient because he was only 17 years of age when he was detained by INS, and therefore lacked the ability to comprehend the nature of his legal proceedings.

On April 30, 2008, the BIA denied the motion for reconsideration. Pet. App. 10a. The BIA held that, absent evidence that Petitioner changed his address with the court, the record supported the finding that Petitioner was given proper notice pursuant to 8 U.S.C. § 1252b. The BIA also found that Petitioner "was 17 years old when he was served personally with the Order to Show Cause; therefore, service of

the Order to Show Cause upon the [Petitioner] was proper" under 8 C.F.R. § 103.5a(c)(2)(ii)(requiring service on adults only for minors under 14 years of age). Pet. App. 11a-12a.

5. Petitioner filed a petition for review with the U.S. Court of Appeals for the Fifth Circuit, requesting review of the BIA's decision on the basis that the government failed to serve the notice of proceedings on an adult pursuant to the release regulations, and therefore violated Petitioner's due process rights.

On June 16, 2010, the Fifth Circuit dismissed the petition holding, in pertinent part, that (i) the BIA's and Eight Circuit's interpretation of the regulations was not unreasonable with respect to serving notice on an adult only for minors under 14; (ii) the government did not violate due process; and (iii) substantial evidence supported the BIA's finding that Petitioner was at fault for not receiving his hearing notice because he failed to keep his address current with the immigration court. Pet. App. 1a-9a.

6. Petitioner filed a petition for rehearing *en banc* to the Fifth Circuit, arguing in part that the panel's reliance on the BIA's unpublished decision was improper because the underlying administrative decision lacked any precedential or persuasive value to warrant agency deference in light of prior decisions by this Court, the Fifth Circuit, and the other circuit courts. Alternatively, Petitioner requested that his case be remanded to the BIA for additional, meaningful guidance on the issue at hand.

On August 19, 2010, the Fifth Circuit dismissed the petition for rehearing without opinion. Pet. App. 14a.

REASONS FOR GRANTING THE WRIT

I.

Review Is Warranted Because The Circuits Are Divided On Whether The Government Must Serve Notice Of Deportation Proceedings On An Adult For Alien Juveniles

The panel decision below effectively deprives an alien juvenile from receiving notice of his or her immigration court hearing through an adult designated to ensure the juvenile's appearance in court. Review of the decision is necessary and appropriate since the opinions conflict with a decision of the Ninth Circuit.

1. The Ninth Circuit held that notice of deportation proceedings with respect to alien juveniles under 18 years of age, must be served on a responsible adult to whom the juvenile is released from agency custody. *See Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1163 (9th Cir. 2004). In reaching its decision, the Court carefully considered the purpose and framework of the release regulations in 8 C.F.R. § 1236.3. *Id.* at 1156-58. Reviewing the regulations, the Court noted that the overarching purpose of § 1236.3 is to protect the welfare of alien minors who are detained in federal custody. *Id.* at 1157. Under these regulations, the government agency must release the alien juvenile (defined as an alien under 18 years of age) to a responsible adult who assumes custody over the juvenile. *See* 8 C.F.R. § 1236.3(b)(1). As part of the release process, the Court noted certain provisions which explicitly require the custodial adult to sign a written agreement with the agency to "ensure the juvenile's

presence at all future proceedings." *Id.* at 1156-57; *see also* 8 C.F.R. § 1236.3(b)(3),(4). On that basis, the Court found that "[t]he fair implication of § [1236.3] as a whole is that any adult to whom an alien juvenile is released is charged with the dual responsibilities of caring for the juvenile and ensuring that the juvenile keeps his obligations to the court." *Id.* at 1156. The Court further reasoned that the regulatory framework presumes that detained aliens under 18 years of age should not be responsible for understanding their rights and obligations with respect to their deportation proceedings. *Id.* at 1157.

Given the purpose and framework of the release regulations, the Ninth Circuit concluded that the only reasonable interpretation of 8 C.F.R. 1236.3, is that it requires the government to serve notice of the juvenile's proceedings on the custodial adult. *Id.* at 1163. To hold otherwise would lead to an unreasonable interpretation of the regulations, as the Court poignantly stated it would be "illogical for the INS both to require the legally responsible adult to ensure the juvenile's attendance at the hearing and to withhold the notice of hearing which would enable the adult to fulfill that responsibility and to understand the consequences of a failure to do so." *Id.* at 1157.

2. By contrast, the Eighth Circuit, in a split opinion, held that notice of the deportation proceedings is served on an adult only when the alien minor is under 14 years of age. *Llapa-Sinchi v. Mukasey*, 520 F.3d 897, 899-901 (8th Cir. 2008). In reaching its decision, the Eighth Circuit agreed with the BIA's determination that the service regulations at 8 C.F.R. § 103.5a(c)(2)(ii) only required service on

an adult for minors under 14 years of age, despite the special treatment afforded to alien juveniles under the release regulations. The Court's rationale for discounting the release regulations was that "[t]he purpose of [§ 103.5a(c)] is to let individuals know the details of their legal proceedings. The purpose of [§ 1236.3], however, is not to provide knowledge, but to provide assistance to minors in a foreign land...." *Id.* at 900-01. The dissenting opinion, however, stated that the case should have been governed by the holding in *Flores-Chavez* because the matter originated within the Ninth Circuit. *Id.* at 901-02.

3. The decision below adopted the decision of the Eighth Circuit, and found that Petitioner was not entitled to have his hearing notice served on an adult because he was not under 14 years of age when he was placed in proceedings. *See* Pet. App. 4a-8a; *Lopez-Dubon v. Holder*, 609 F.3d 642, 646 (5th Cir. 2010). Additionally, the Court considered § 103.5a(c) as controlling over § 1236.3 because the service regulations explicitly call for notification on an adult, whereas the release regulations do not. *Id.* Rejecting the Ninth Circuit's decision, the Court stated that it "would be a strained analysis indeed ... that the more general release provision somehow negated the specific service provision despite making no reference to notification at all." *Id.*

4. The Second Circuit considered this issue but opted to remand the case to the BIA for a precedential interpretation of the relevant regulations. *See Llanos-Fernandez v. Mukasey*, 535 F.3d 79 (2d Cir. 2008). To date, the BIA has not made a decision.

5. The decision below conflicts with *Flores-Chavez* and creates a clear circuit split on whether the government must serve notice of deportation proceedings on an adult under the release regulations. Contrary to the Fifth and Eighth Circuits, the Ninth Circuit sets forth a reasonable interpretation of the release regulations, necessitating adult notification of proceedings to ensure the juvenile's appearance in court. Further, as indicated by Judge Bye in his dissent in *Llapa-Sinchi*, the differential treatment within the country regarding service on alien juveniles could promote forum shopping by both parties. *Id.* at 901-02. Therefore, this Court should review and correct the holdings of the Fifth and Eighth Circuits to restore uniformity.

II.

Review Is Warranted Because The Decisions By The Fifth And Eighth Circuits Contravene the Framework And Purpose Of The Release Regulations

A review of the *Flores-Chavez* case reveals that requiring service of notice on the adult to whom the alien juvenile is released is a reasonable interpretation of the release regulations in light of its framework and purpose. Petitioner therefore submits that the conflicting opinions by the Fifth and Eighth Circuits are erroneous and that this Court may wish to summarily reverse the decision below.

1. The regulatory framework of 8 C.F.R. § 1236.3 supports the position that the government must serve notice of proceedings on an adult to whom the alien juvenile is released. As the Ninth Circuit correctly observed, the release regulations presume

that unaccompanied aliens under 18 years of age whom are detained should not be responsible for understanding their responsibilities, and therefore require additional safeguards to ensure they are not deprived of their right to a hearing. *See Flores-Chavez*, 362 F.3d at 1157; *see also In re Gault*, 387 U.S. 1, 33-34 (1967). This presumption is valid particularly in light of another regulation prohibiting an immigration judge from considering admissions of an unrepresented minor under 18 who is not accompanied by a guardian, friend or relative. *See* 8 C.F.R. § 1240.10(c).

Given the concern over a juvenile's presumed lack of understanding of the legal proceedings, the regulations obligate the custodial adult of ensuring the appearance of the juvenile in court. *See* 8 C.F.R. § 1236.3(b)(1),(3)-(4). Therefore, it is only logical that the government serve the hearing notice on the adult responsible for meeting that obligation.

2. In the present case, the panel below adopted the Eighth Circuit's decision in *LLapa-Sinchi*, which held that adult notification of the proceedings is only required for alien minors under 14 years of age in view of 103.5a(c)(2)(ii). The Eighth Circuit reasoned that the release regulations provide only basic assistance to foreigners whereas the service regulations provide knowledge of the alien's legal proceedings. *Llapa-Sinchi*, 520 F.3d at 900-01. However, the Court's rationale is erroneously premised on a false presumption that the purpose of the release regulations is merely to provide basic assistance to a juvenile upon release from custody. As this Court stated, the explicit purpose of the release regulations is "to protect the welfare of the juvenile". *Reno v. Flores*, 507 U.S. 292, 311 (1993).

With this purpose in mind, coupled with the concern over the likelihood that unaccompanied juveniles will actually appear in court, the government devised a system by which juveniles are released into the custody and care of a responsible adult, who in turn has the responsibility of ensuring the juveniles attend the proceedings. *See* 53 Fed Reg. 17449 (May 17, 1988). The resulting regulations reflect not only the concerns over the well-being and safety of the juveniles, but also the importance of knowing critical information about the legal proceedings. For example, the agency is required to serve a detained juvenile with a Form I-770, Notice of Rights and Disposition. *See* 8 C.F.R. § 1236.3(h). This form explains the legal basis for the juvenile's detention, and informs the juvenile of the right to telephone a parent, legal guardian, adult friend or relative. It also notifies the juvenile of the right to speak to an attorney and to have a hearing before an immigration judge. Thus the Eighth Circuit's description of the regulation's purpose is seriously understated.

3. The panel below also found the service regulation controlling, because it specifically provides for service upon an adult whereas the release regulations do not. Pet. App. 5a-6a. In so doing, the panel misses the point of *Flores-Chavez*, which is that the release regulations are specific in and of themselves, governing particular situations where an alien minor is detained and released by immigration authorities. By comparison, § 103.5a(c) does not make any references to alien minors who are detained and released by the government agency. As a result, there is no guidance on how such aliens should be served or treated under the service regulations. Put another way, the service

regulations are only applicable to alien minors under 14 *unless they are detained and released by immigration officials*; in such event, the release regulations contemplate that these minors, who are most likely unaccompanied by a parent or adult, will be provided greater protection commensurate to their situation.

III.

Review Is Warranted Because Service Under 8 C.F.R. 103.5a(c) Alone Is Legally Insufficient To Provide An Alien Juvenile With Notice Of His Or Her Deportation Hearing

1. The panel held that the government did not violate Petitioner's due process rights for not sending the hearing notice to an adult. Pet. App. 6a-8a. In so holding, the panel turned to this Court's standard in *Mullane v. Cent. Hanover Bank & Trust*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950), to determine whether service under 8 C.F.R. § 103.5a(c) alone satisfies due process requirements for alien juveniles. Under this standard, notice is legally sufficient if it is "reasonably calculated, *under all the circumstances*, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314 (emphasis added). On that basis, the panel found that notice under the service regulations was legally adequate to notify Petitioner of his deportation hearing. Unfortunately, the panel failed to consider that the service regulations only govern the *initial* notice of proceedings, which may or may not include information relating to the time and

place of the court hearing.[7] Notably, service of notice under 8 C.F.R. § 103.5a applies only in the following situations:

> In any proceeding which is *initiated* by the Service, with proposed adverse effect, service of the *initiating notice* and of notice of any decision by a Service officer shall be accomplished by personal service.

§ 103.5a(c)(1)(emphases added).

The panel's decision regarding the legal sufficiency of notice under 8 C.F.R. § 103.5a(c) for alien juveniles is based on a faulty presumption that the initial notices will always include information about the time, place and date of the court hearing. However, notices that initiate deportation proceedings may not necessarily contain information about the alien's hearing date, like the OSC issued by INS in the instant matter. In such instances, the procedural safeguards in § 103.5a(c) would not cover subsequent hearing notices issued by the immigration court. Thus, it cannot be said that service under § 103.5a(c) is reasonably calculated to reach an alien juvenile *under all circumstances*.

2. Given that the due process interests of many alien juveniles are at stake, the panel also failed to consider whether § 103.5a(c), as interpreted by the BIA and Eighth Circuit, provides constitutionally sufficient notice to alien juveniles. Under *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court set forth

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[7] For cases involving a postponement in the hearing, "written notice shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or the alien's counsel of record, if any) specifying the new time or place of the proceedings...." 8 U.S.C. § 1229(a)(2)(A)(i).

a three-prong test for analyzing whether the procedural safeguards created by an administrative agency are constitutionally sufficient to protect the due process interests of individuals. *Id.* at 332-335. Under *Mathews*, the court must consider:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

Applying the *Mathews* test here, it is apparent that requiring adult notification only for minors under 14 years of age will violate the liberty interests of alien juveniles between the ages of 14 and 17. First, there is a substantial private interest in receiving notice in protecting one's liberty interests. *See Yamataya v. Fisher*, 189 U.S. 86 (1903). Second, the risk of error is too substantial if adult notification is only required for minors under 14 years of age. As the regulatory framework of § 1236.3 shows, alien minors under 18 who are apprehended and detained by the government, require additional protections to safeguard their liberty interests throughout deportation proceedings, especially since most of these aliens are unaccompanied by an adult. The regulations require that these aliens be released to a responsible adult who will oversee the process and ensure the alien's appearance in court. The facts of the present case underscore the importance of having

a responsible adult involved in the proceedings. Here, three different courts purported to have jurisdiction over Petitioner's case, two of which issued conflicting hearing notices at one point. Petitioner's proceedings were also transferred to another jurisdiction without his knowledge. Thus, having an adult navigate him through the process and ensure his court appearance was critical. Finally, the burden placed on the government is minimal when compared to the interest of protecting the welfare and due process rights of the juvenile.

Balancing these factors, the Court should conclude that the government violates the due process rights of alien juveniles by not requiring that notice be served on an adult who carries the important obligation of ensuring the juvenile's appearance in court.

IV.

Review Is Warranted Because The Panel Improperly Relied On An Agency Decision That Lacked Any Precedential Or Persuasive Value

1. The panel has created a holding contradictory to the precedent of the Supreme Court, the Fifth Circuit and other U.S. Courts of Appeal relating to whether deference should be given to an agency's non-precedential decision. In dismissing the petition for review, the panel deferred to the BIA's unpublished opinion below, noting that its interpretation of the service regulations was reasonable. Pet. App. 5a-6a.

The BIA decision below is not owed any deference because it was not precedential, and thus lacked the force of law necessary for agency deference. Where

the law is ambiguous or silent about a certain issue, the court may defer to an agency's interpretation unless it is unreasonable or clearly erroneous. *See Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984); *see also Navarro-Miranda v. Ashcroft*, 330 F.3d 672 (5th Cir. 2003)(the same applies for an agency's interpretation of its regulations). This Court has held that an agency may be given *Chevron* deference where the agency has been delegated with the authority to make rules carrying the force of law, and that the agency's interpretation in question is promulgated in the exercise of that authority. *United States v. Mead Corp.*, 121 S.Ct. 2164, 2171-74 (2001); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). The Fifth Circuit has held that an agency's unpublished interpretation of a law that is not the result of formal adjudication or rulemaking, does not warrant *Chevron* deference. *La. Envtl. Action Network v. United States EPA*, 382 F.3d 575, 583 (5th Cir. 2004)(declining to apply *Chevron* deference to the EPA's unpublished preamble because it was created without going through a notice-and-comment period). Other U.S. Courts of Appeals have held that non-precedential BIA decisions should not be entitled to agency deference because they do not carry the force of law. *See, e.g., Quinchia v. U.S. Atty. Gen.*, 552 F.3d 1255, 1258 (11th Cir. 2008); *Rotimi v. Gonzales*, 473 F.3d 55, 57-58 (2d Cir. 2007); *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1012-14 (9th Cir. 2006); *Leal-Rodriguez v. INS*, 990 F.2d 939, 946 (7th Cir. 1993).

Furthermore, agency regulations provide that the BIA, "through *precedent* decisions, *shall* provide clear and uniform guidance to the Service, the immigration judges, and the general public on the

proper interpretation and administration of the Act and its implementing regulations." 8 C.F.R. § 1003.1(d)(emphases added). A BIA precedent decision is "binding on all officers and employees of the Department of Homeland Security or immigration judges in the administration of the immigration laws of the United States." 8 C.F.R. § 1003.1(g). Moreover, a decision does not become precedential unless it goes through a selection process requiring a majority vote by the permanent members of the BIA. *Id.*

In the instant matter, the BIA's non-precedential decision lacked any authoritative effect by definition of its own regulations. The decision was not the result of the agency's rulemaking process for creating precedential opinions. Therefore, the BIA's opinion is not entitled to agency deference under *Chevron*.

2. Insofar as the panel found the BIA's opinion persuasive, the administrative decision lacked any meaningful reasoning regarding the central issue of whether an alien juvenile who is detained and released by INS is entitled to have notice of his hearing sent to a responsible adult. Deference to an agency interpretation is premised on the fact that "the agency considered the matter in a detailed and reasoned fashion...." *Chevron*, 467 U.S. at 865; *see also Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944). Despite the salient tension between the Ninth and Eighth Circuit on the aforementioned issue, the BIA chose to issue a non-precedential decision signed by only one BIA member finding that Petitioner was properly served with notice. The entire decision dedicated only two sentences to the issue of proper service on an alien minor. The decision failed to provide any meaningful

interpretation of the relevant regulations, nor does it give any justification to adopt the reasoning of the Eighth Circuit or reject the reasoning of the Ninth Circuit, other than to state, "[Petitioner] was 17 years old when he was served personally with the Order to Show Cause; therefore, service of the Order to Show Cause upon [Petitioner] was proper." Pet. App. 11a. While an unpublished decision may be considered persuasive, the BIA's interpretation was not the result of any detailed or reasoned consideration that would support its persuasive value.

Therefore, the panel's decision was erroneous because it relied upon an unpublished BIA decision which lacked any meaningful rationale for its decision. Accordingly, Petitioner respectfully submits that, at the least, the Court consider the case for summary reversal.

CONCLUSION

Based on the foregoing, Petitioner respectfully submits that this Petition for Writ of Certiorari should be granted. The Court may wish to consider summary reversal of the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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DOUGLAS VLADIMIR LOPEZ-DUBON, Petitioner
v. ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL, Respondent

No. 08-60478

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

609 F.3d 642

June 16, 2010, Filed

[*643] DENNIS , Circuit Judge:

In June 1996, Petitioner Douglas Vladimir Lopez-Dubon ("Lopez-Dubon") entered the United States without inspection or authorization. He was apprehended in September of that year and was personally served with an Order to Show Cause ("OSC") why he should not be deported. Lopez-Dubon was 17 at the time. Upon his release he was informed that he would be notified of the date and location of his deportation hearing by mail, and that it was his responsibility to keep the immigration [*644] authorities informed as to his current address. Notice was mailed to the address Lopez-Dubon had provided before his release, but was returned because Lopez-Dubon no longer lived there and the postal service could not complete delivery. A year later, on July 14, 1997, after Lopez-Dubon failed to appear, an immigration judge ordered him deported in absentia.

On November 17, 2006, Lopez-Dubon filed a motion to reopen his case in order to seek adjustment of his immigration status. Lopez-Dubon's motion stated that he was 17 at the time he was initially detained in September 1996. The motion did not argue that his age had any relevance, however, but

instead claimed that he had never received notice of the deportation hearing. An immigration judge denied the motion and Lopez-Dubon appealed to the Board of Immigration Appeals ("BIA"), which dismissed his appeal on the grounds that a notice of the hearing was sent to the address Lopez-Dubon had provided when he was released, but was returned as undeliverable. Lopez-Dubon filed a motion for reconsideration, arguing for the first time that notice should have been served on a responsible adult because Lopez-Dubon was only 17 at the time he was detained. The BIA denied the motion but, rather than holding that the age-related-notice argument was not properly before it, the BIA addressed the issue on the merits and rejected Lopez-Dubon's argument. Lopez-Dubon timely filed a petition for review.

The first question in this case is whether this court has jurisdiction over Lopez-Dubon's appeal. An alien's failure to exhaust administrative remedies is a jurisdictional bar to our consideration of an issue. 8 U.S.C. § 1252(d)(1); *Roy v. Ashcroft*, 389 F.3d 132, 137 (5th Cir. 2004). In this case, Lopez-Dubon did not raise the issue of age-related notice until his motion for reconsideration before the BIA. Nevertheless, the BIA addressed the issue on the merits. We have not previously addressed the question of whether an issue not properly raised by a petitioner in immigration proceedings but nevertheless addressed on the merits by the BIA may be considered by this court. *See Omari v. Holder*, 562 F.3d 314, 319 (5th Cir. 2009) (noting a circuit split on this issue but declining to choose a side). Almost every court of appeals will address an issue on the merits when the BIA has done so, even if the

issue was not properly presented to the BIA itself. *See Lin v. Attorney General*, 543 F.3d 114, 122-26 (3d Cir. 2008)(discussing circuit split).[1] We agree. We are persuaded that, as the Tenth Circuit has reasoned, the purpose of the statutory exhaustion requirement is to allow the BIA "the opportunity to apply its specialized knowledge and experience to the matter" and to "resolve a controversy or correct its own errors before judicial intervention." *Sidabutar v. Gonzales*, 503 F.3d 1116, 1122 (10th Cir. 2007) (internal citations and quotation marks omitted). These purposes are fulfilled when the BIA chooses to address an issue on the merits despite potential defects in its posture before the BIA. Thus, "[i]f the BIA deems an issue sufficiently presented to consider it on the merits, such action by the BIA exhausts the issue as far as the agency is concerned and that is all that [8 U.S.C.] § 1252(d)(1) requires to confer our jurisdiction." *Id.* at 1119.[2] We therefore have jurisdiction over **[*645]** the question of whether the notice provided to Lopez-Dubon was insufficient because of his age at the time of his detention.

This court reviews a decision by the BIA under a "highly deferential" standard. *Zhao v. Gonzales*, 404 F.3d 295, 301-03 (5th Cir. 2005). The BIA's factual findings are reviewed under a "substantial evidence" standard, such that this court will not overturn factual findings unless the evidence compels a contrary conclusion. *Mireles-Valdez v. Ashcroft*, 349

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[1] Only the Eleventh Circuit bars review in such a circumstance. *Amaya-Artunduaga v. Attorney General*, 463 F.3d 1247, 1250-51 (11th Cir. 2006).

[2] U.S.C. § 1252(d)(1) simply states that a federal court may review a final order of removal only if "the alien has exhausted all administrative remedies available to the alien as of right."

F.3d 213, 215 (5th Cir. 2003). Question of law are reviewed de novo, but "[w]e accord deference to the Board's interpretation of immigration statutes unless there are compelling indications that the Board's interpretation is incorrect." *Rojas v. INS*, 937 F.2d 186, 189 (5th Cir. 1991).

On appeal, Lopez-Dubon argues that the notice of deportation was never properly served because he was 17 at the time of his detention and release and therefore notice should have been served upon a responsible adult instead of him. Lopez-Dubon's argument rests on the interaction, if any, between 8 C.F.R. § 1236.3, governing the release of juvenile aliens, and 8 C.F.R. § 103.5(a), governing service of notice requirements for deportation proceedings. Section § 1236.3 provides that a juvenile (defined as an alien under the age of 18) "shall be released, in order of preference, to: (i) A parent; (ii) Legal guardian; or (iii) An adult relative (brother, sister, aunt, uncle, grandparent) who is not presently in Service detention . . . ." This regulation says nothing about notice. However § 103.5(a), which is entitled "Service of notification, decisions, and other papers by the Service," states that service of notice for immigration proceedings on a responsible adult is only required "in the case of a minor under 14 years of age." *Id.* at § 103.5a(c)(2)(ii). Lopez-Dubon argues, essentially, that despite the explicit provision calling for service on an adult only if the detained minor is under 14 years of age, the separate provision requiring release of aliens under 18 to an adult's custody overrides the specific service of notice provision and requires that notice be served on an adult for all aliens under 18 years of age. In so arguing, Lopez-Dubon relies on a Ninth Circuit

opinion, Flores-Chavez v. Ashcroft, 362 F.3d 1150 (9th Cir. 2004), which adopted this reasoning, determined that the two provisions were inconsistent, and held that the BIA's decision that the service provision controlled was unreasonable. Instead, the Ninth Circuit held, the release provision required that notice be served on an adult for any alien under 18 years of age. *See id.* at 1163.

The BIA, however, concisely rejected that reasoning in this case. The BIA acknowledged that the regulations require notice to be served on an adult for aliens under 14 years of age, but noted that Lopez-Dubon was 17 at the time of his detention and therefore held that service of the Order to Show Cause upon him was proper. Though doubtless aware of Flores-Chavez, the BIA instead cited to an Eighth Circuit case, *Llapa-Sinchi v. Mukasey*, 520 F.3d 897 (8th Cir. 2008). *In Llapa-Sinchi*, the Eighth Circuit rejected the Ninth Circuit's reasoning in *Llapa-Sinchi v. Mukasey*, 520 F.3d at 900-01. The Eighth Circuit instead deferred to the BIA's determination in Llapa-Sinchi's case that the general service provision of § 103.5(a) controls.[3] *Id.*

[*646] By citing to *Llapa-Sinchi*, the BIA in this case adopted the Eighth Circuit's approach and reaffirmed that it interprets its own regulations to require notice to be served on an adult only when an alien is under 14 years of age. We cannot say that

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[3] The Second Circuit was also presented with this question in *Llanos-Fernandez v. Mukasey*, 535 F.3d 79, 85 (2d Cir. 2008). The Second Circuit declined to decide the issue and instead remanded to the BIA for additional guidance. The BIA has not issued a new opinion in the case as of this writing.

this is an unreasonable interpretation of the regulations. The service provision specifically calls for notice to be served on an adult only when the alien is under 14 years of age. The release provision relied upon by Lopez-Dubon and by the Ninth Circuit does not cross-reference or address the service provision, and it would be a strained analysis indeed that would resolve this issue by deciding not only that the provisions were inconsistent but that the more general release provision somehow negated the specific service provision despite making no reference to notification at all. We therefore affirm the BIA's holding that notice must be served on an adult only for aliens under 14 years of age. *See also Interiano de Rivas v. Gonzales*, 177 F. App'x 447, 448-51 (5th Cir. 2006) (unpublished) (holding that service on a 17 year-old was proper without addressing the question of age); *Matter of Ponce-Hernandez*, 22 I. & N. Dec. 784, 785 (B.I.A. 1999) (holding that service on a 15-year-old was proper).

Lopez-Dubon also argues that service of notice of a deportation hearing on a minor is an unconstitutional violation of due process. We are unpersuaded. An alien is entitled to due process with regard to his deportation hearing. *United States v. Estrada-Trochez*, 66 F.3d 733, 733-36 (5th Cir. 1995). For service to satisfy the requirements of due process, it must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950). In general, sending notice of a deportation hearing to an alien satisfies this requirement. *Estrada-Trochez*, 66 F.3d at 736.

Lopez-Dubon argues that due process requires that notice be served upon a responsible adult if an alien is under 18. But minors "can be responsible for their own legal status and can waive their constitutional rights" in some circumstances. *Llapa-Sinchi*, 520 F.3d at 900. The Supreme Court has held that "minors can be responsible for waiving their right to appeal deportation and custody determinations." *Id.* (citing *Reno v. Flores*, 507 U.S. 292, 308-09, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993)). Minors are also empowered to waive various other legal rights, at certain times and in certain contexts, including Miranda rights, the right to appeal, and the right to a jury trial. *See Llapa-Sinchi*, 520 F.3d at 900 (listing cases). As the Eighth Circuit pointed out in *Llapa-Sinchi*, many states allow personal service on minors as young as 14. *Id.* (citing Missouri, Minnesota, Nevada, Arkansas and North Dakota statutes). Here, Lopez-Dubon was 17 years old, only one year shy of legal adulthood. He conceded that he was informed that he would have to appear for a deportation hearing, and that he understood that responsibility and planned to appear. Thus, we hold that the notice served in this case was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the actions and afford them an opportunity to present their objections," *Mullane*, 339 U.S. at 314. There was no due process violation.

Having established that Lopez-Dubon was the proper party to receive [*647] notice and that serving notice on him at 17 years of age was not a due process violation in and of itself, we must consider whether the BIA's factual finding that notice was properly served was supported by substantial

evidence. An alien is entitled to written notice of immigration proceedings against him, but an alien is responsible for updating immigration authorities with his current address. *Gomez-Palacios v. Holder*, 560 F.3d 354, 358 (5th Cir. 2009). Thus an order of removal will not be set aside, even if the alien did not receive notice, if "the alien's failure to receive actual notice was due to his neglect of his obligation to keep the immigration court apprised of his current mailing address." *Gomez-Palacios*, 560 F.3d at 360.

The BIA found that notice of the deportation hearing was sent by certified mail to Lopez-Dubon at his last known address, and that Lopez-Dubon was advised at the time of his release of the consequences of failure to appear at his deportation hearing, and also of his responsibility to keep the immigration court updated as to his whereabouts so that notice of any proceedings could be sent to him. The BIA found that there was no evidence that Lopez-Dubon had attempted to update his address with the immigration court. Lopez-Dubon has not pointed to any evidence suggesting that these findings were clearly erroneous. The findings were supported by substantial evidence: the record contained the notice that was sent, which was returned when Lopez-Dubon could not be located at the address he provided, and there is no evidence that Lopez-Dubon kept the immigration court informed of his change of address, nor does his affidavit state that he did so. We therefore affirm the BIA's finding that Lopez-Dubon's failure to receive notice of his hearing was due to his own neglect, and he is not entitled to relief on this ground.

Finally, we reject Lopez-Dubon's argument that the BIA and the immigration judge abused their

discretion in failing to reopen his deportation proceedings sua sponte. The authority to sua sponte reopen deportation proceedings is entirely discretionary, and we lack jurisdiction to review this claim. *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 250 (5th Cir. 2004).

For the foregoing reasons the petition for review is DENIED.

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A75 282 170- New Orleans, LA
Date: Apr 30 2008

In re: DOUGLAS VLADIMIR LOPEZ-DUBON
In Deportation Proceedings -- Motion

ON BEHALF OF RESPONDENT: Jennifer L. West
ON BEHALF OF DHS: Joseph B. La Rocca
Assistant Chief Counsel

APPLICATION: Reconsideration

We will accept this case by certification to avoid any question of untimeliness. *See* 8 C.F.R §1003.1(c). This case was last before the Board of November 20, 2007, when we dismissed the respondent's appeal from the Immigration Judge's decision denying the respondent's motion to reopen. The immigration Judge had previously ordered the respondent deported in absentia for his failure to appear for the hearing on July 14, 1997. The respondent now moves the Board pursuant to 8 C.F.R. § 1003.2 to reconsider our decision.

In the motion to reconsider, the respondent contents that there is no evidence that the scheduling and notice of hearings was done in the prescribed methods. The respondent also asserts

that the Board erred in failing to address how service on Mr. Vega complies with the regulatory requirements at 8 C.F.R. §1003.17, because Mr. Vega was not counsel of record, nor did the respondent ever retain Mr. Vega for representation in his case. The respondent avers that the record on appeal reflects a clear bias in favor of the Immigration Judge. The respondent also claims that as a minor, he could not have legally possessed the ability to receive any oral warnings. Finally, the respondent asserts that the Immigration Court failed to provide him with written notice of the consequences of a failure to appear.

We disagree with the respondent's contentions in the motion to reconsider. The evidence of record supports the finding that the respondent was given proper notice of the deportation hearing in accordance with section 242B of the Immigration Act, 8 U.S.C. § 1252b. Initially, we note that if the alien is a minor under 14 years of age, the regulations require that service be made upon the person with whom the minor resides; and whenever possible, service must also be made on the near relative, guardian, committee, or friend. *See* 8 C.F.R. §103.5a(c)(2)(ii). However, the respondent was 17 years old when he was served personally with the Order to Show Cause; therefore, service of the Order to Show Cause upon the respondent was proper. *See Llapa-Sinchi v. Mukasey*, 2008 WL 819093 (8th Cir. 2008).

The Board functions as an appellate body charged with the review of decisions of Immigration Judges in deportation cases. 8 C.F.R. §1003.1 (b)(2). The Board must resolve the questions before it in a manner that is timely, impartial, and consistent with

the Act and regulations. 8 C.F.R. § 1003.1 (d)(1). Contrary to the respondent's contention on appeal that the record reflects a clear bias in favor of the Immigration Judge, the Board's previous detailed and extensive decision applied the facts of the respondent's case to the applicable statute, regulations and case law, in determining that the respondent received proper notice of his hearing. As we stated in our previous decision, the fact that several earlier notices of hearing were sent to Jose W. Vega, Esquire, are irrelevant to the finding of proper notice in this case. The fact remains that a copy of the last hearing notice, dated June 26, 1997, was sent to the respondent at his address which appears on the Order to Show Cause: 940 Airline, Apt. #10723, Houston, TX 77037. The record contains the hearing notice was returned to the Immigration Court as undeliverable. There is no evidence in the record that the respondent has ever submitted a change of address form (Form EOIR-33) to the Immigration Court, despite the fact that he was advised of the requirement to do so.

Furthermore, the notice of hearing dated June 26,1997, was sent to the respondent by certified mail and advised the respondent of the consequences of the failure to appear at his proceedings, pursuant to section 242B(a)(2)(A) of the Act. However, the respondent failed to provide an address where he could be contacted. The Order to Show Cause served personally upon the respondent was written in English and Spanish, and specifically advised the respondent that he was required to provide written notice, within five (5) days, of any change in his address or telephone number to the office of the Immigration Judge, and any notices would be mailed only to the last address provided. *See* Order to Show

Cause, at 4. The hearing notice was sent to the respondent's last known address by certified mail, and the Immigration Judge properly ordered him deported in absentia after he failed to appear for his hearing on July 14, 1997.

Finally, as we stated in our previous decision, the respondent's motion to reopen for adjustment of status is untimely, pursuant to *Matter of M-S*, 22 I&N Dec. 349 (BIA 1998). Consequently, the respondent has failed to present any additional legal arguments, a change of law, or an argument or aspect of the case which was not previously considered by the Board. Accordingly, the respondent's motion to reconsider will be denied.

ORDER: The motion is denied

/s/

FOR THE BOARD

DATE FILED, 08/19/2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-60478

DOUGLAS VLADIMIR LOPEZ-DUBON,
Petitioner

v.

ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL,

Respondent

Petition for Review of an Order of the

Board of Immigration Appeals

ON PETITION FOR REHEARING EN BANC

(Opinion 6/16/10, 5 Cir., ____, _____, F.3d ____)

Before JOLLY and DENNIS, Circuit Judges, and BOYLE, District Judge.*

PER CURIAM:

(√) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor

(FED. R. APP. P and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Dennis

United States Circuit Judge

*District Judge, Northern District of Texas, sitting by designation.

8 C.F.R. § 1236.3 -Detention and release of juveniles.

(a) Juveniles. A juvenile is defined as an alien under the age of 18 years.

(b) Release. Juveniles for whom bond has been posted, for whom parole has been authorized, or who have been ordered released on recognizance, shall be released pursuant to the following guidelines:

(1) Juveniles shall be released, in order of preference, to:

(i) A parent;

(ii) Legal guardian; or

(iii) An adult relative (brother, sister, aunt, uncle, grandparent) who is not presently in Service detention, unless a determination is made that the detention of such juvenile is required to secure his or her timely appearance before the Service or the Immigration Court or to ensure the juvenile's safety or that of others. In cases where the parent, legal guardian, or adult relative resides at a location distant from where the juvenile is detained, he or she may secure release at a Service office located near the parent, legal guardian, or adult relative.

(2) If an individual specified in paragraphs (b)(1)(i) through (iii) of this section cannot be located to accept custody of a juvenile, and the juvenile has identified a parent, legal guardian, or adult relative in Service detention, simultaneous release of the juvenile and the parent, legal guardian, or adult relative shall be evaluated on a discretionary case-by-case basis.

(3) In cases where the parent or legal guardian is in Service detention or outside the United States,

the juvenile may be released to such person as is designated by the parent or legal guardian in a sworn affidavit, executed before an immigration officer or consular officer, as capable and willing to care for the juvenile's well-being. Such person must execute an agreement to care for the juvenile and to ensure the juvenile's presence at all future proceedings before the Service or an immigration judge.

(4) In unusual and compelling circumstances and in the discretion of the Director of the Office of Juvenile Affairs, a juvenile may be released to an adult, other than those identified in paragraphs (b)(1)(i) through (b)(1)(iii) of this section, who executes an agreement to care for the juvenile's well-being and to ensure the juvenile's presence at all future proceedings before the Service or an immigration judge.

(c) Juvenile coordinator. The case of a juvenile for whom detention is determined to be necessary should be referred to the "Juvenile Coordinator," whose responsibilities should include, but not be limited to, finding suitable placement of the juvenile in a facility designated for the occupancy of juveniles. These may include juvenile facilities contracted by the Service, state or local juvenile facilities, or other appropriate agencies authorized to accommodate juveniles by the laws of the state or locality.

(d) Detention. In the case of a juvenile for whom detention is determined to be necessary, for such interim period of time as is required to locate suitable placement for the juvenile, whether such placement is under paragraph (b) or (c) of this section, the juvenile may be temporarily held by Service authorities or placed in any Service detention

facility having separate accommodations for juveniles.

(e) Refusal of release. If a parent of a juvenile detained by the Service can be located, and is otherwise suitable to receive custody of the juvenile, and the juvenile indicates a refusal to be released to his or her parent, the parent(s) shall be notified of the juvenile's refusal to be released to the parent(s), and they shall be afforded the opportunity to present their views to the district director, chief patrol agent, Director of the Office of Juvenile Affairs or immigration judge before a custody determination is made.

(f) Notice to parent of application for relief. If a juvenile seeks release from detention, voluntary departure, parole, or any form of relief from removal, where it appears that the grant of such relief may effectively terminate some interest inherent in the parent-child relationship and/or the juvenile's rights and interests are adverse with those of the parent, and the parent is presently residing in the United States, the parent shall be given notice of the juvenile's application for relief, and shall be afforded an opportunity to present his or her views and assert his or her interest to the district director, Director of the Office of Juvenile Affairs or immigration judge before a determination is made as to the merits of the request for relief.

(g) Voluntary departure. Each juvenile, apprehended in the immediate vicinity of the border, who resides permanently in Mexico or Canada, shall be informed, prior to presentation of the voluntary departure form or being allowed to withdraw his or her application for admission, that he or she may make a telephone call to a parent, close relative, a friend, or to an

organization found on the free legal services list. A juvenile who does not reside in Mexico or Canada who is apprehended shall be provided access to a telephone and must in fact communicate either with a parent, adult relative, friend, or with an organization found on the free legal services list prior to presentation of the voluntary departure form. If such juvenile, of his or her own volition, asks to contact a consular officer, and does in fact make such contact, the requirements of this section are satisfied.

(h) Notice and request for disposition. When a juvenile alien is apprehended, he or she must be given a Form I-770, Notice of Rights and Disposition. If the juvenile is less than 14 years of age or unable to understand the notice, the notice shall be read and explained to the juvenile in a language he or she understands. In the event a juvenile who has requested a hearing pursuant to the notice subsequently decides to accept voluntary departure or is allowed to withdraw his or her application for admission, a new Form I-770 shall be given to, and signed by the juvenile.